Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-543

SECURITY TIRE AND RUBBER COMPANY,
a Virginia Corporation,
Petitioner,

v.

THE GATES RUBBER COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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To the Supreme Court of the United States:

OPINION BELOW

The opinion of the Fifth Circuit is reported at 598 F.2d 962.

QUESTION PRESENTED

Petitioner ("Security"), Plaintiff in the trial court, here continues an effort, accepted by the District Court, but rejected by the Fifth Circuit, to constitute itself as an alleged disfavored customer in an alleged Robinson-Patman Act price

discrimination by trying to make a wholly-owned sales subsidiary ("National") of the Respondent ("Gates") the favored purchaser from Gates, when National exists on paper only (charter), 598 F.2d 962, 967 n.3, with the sole basis of the discrimination claim being that Gates did not sell tires to Security at its cost and at no profit (App. 300-301). The question presented to this Court is whether it will grant certiorari to review the Fifth Circuit decision when the Fifth Circuit held (1) that transfers from a parent corporation to its wholly-owned subsidiary corporation cannot be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit and (2) even if transfers from a parent corporation to its wholly-owned subsidiary corporation could be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit, Security failed to prove such a sale from Gates to National. 598 F.2d 962, 967 n.3.

STATEMENT OF THE CASE

Gates is in the rubber manufacturing business, and its product line included tires for motor vehicles. Gates completely ceased manufacturing tires by the Spring of 1974. Security was a private brand seller of tires, a private brand being a line of tires produced for a customer with a brand name, imprinted on the tires, which is owned by and identified with that customer. Security started business in 1964. From that time until the Fall of 1973 Security purchased most of its tires from Gates. 598 F.2d 962, 963.

During the period relevant to this lawsuit, 1969-1973, there also existed a wholly-owned subsidiary of Gates, National Tires, Inc.. In effect, Gates marketed tires under the National label. Gates exercised full dominion and control over National, and National had no separate existence from Gates other than a corporate charter. 598 F.2d 962, 963, 967 n.3.

Security and Security-Texas, a sister corporation, instituted a lawsuit in the Western District of Texas against Gates on February 8, 1974. Among other things, the lawsuit included a treble damage action under the Robinson-Patman Act, alleging a secondary line discrimination. The theory and proof of Security's case assigned National the role of their competitor and the beneficiary of Gates' price discrimination — the so-called "favored customer". Security and Security-Texas sought to assign themselves the roles of the victims of Gates' price discrimination — the so-called "disfavored customers". There was neither any further allegation nor proof of any other beneficiary of Gates' alleged price discrimination. 598 F.2d 962, 963-965. The Plaintiffs' sole Robinson-Patman complaint was that Gates would not sell tires to Plaintiffs at Gates' cost and at no profit. (App. 300-301).

Security won a jury verdict on the Robinson-Patman claim in the amount of One Hundred Thousand ($100,000.00) Dollars. The amount was trebled and, along with other claims not pertinent to the Petition for Certiorari, was reduced to judgment in the amount of Three Hundred Thousand ($300,000.00) Dollars. Gates perfected its appeal to the Fifth Circuit, which reversed the trial court's Robinson-Patman judgment. In doing so, the Fifth Circuit held that transfers from a parent corporation to its wholly-owned subsidiary corporation cannot be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit. However, the Fifth Circuit also held that, if transfers from a parent corporation to its wholly-owned subsidiary can be considered separate sales to a favored customer, then Security still completely failed to prove a sale from Gates to National.

ARGUMENT

At the outset, Gates would point out that Security's Petition for Certiorari appears frivolous. It is supported by little or no authority and is mainly rhetorical in nature, and raises matters not relevant to the Court's consideration, such as whether there may be a sale from a parent to a partially-owned subsidiary, and questions of jurisdiction, venue, income tax, franchise tax, creditors' rights, torts, contracts, agency, bailment and employers' liability. At the same time, it skirts and, seemingly, tries to avoid the Robinson-Patman issue. At best, the Petition for Certiorari raises matters of importance to the litigants only. As a matter of fact, the Fifth Circuit held that Security loses its Robinson-Patman case under the Fifth Circuit's theory and under Security's theory relating to sales from a parent to a wholly-owned subsidiary.

Laid to its barest bones, Security's sole complaint in its Petition for Certiorari is that Gates refused to sell to Security, tires at Gates' cost and at no profit. With this in mind, Gates will set forth the reasons why the Petition for Certiorari should not be granted.

Security's primary argument for granting certiorari is set out at pages six (6) and eight (8) of the Petition as follows:

> The question presented here is simply whether a sale by a manufacturer to its wholly-owned separate corporation subsidiary can be a sale to a favored customer of which the disfavored independent can complain. This is a profoundly important question of federal law which has not been, but should be, settled by this court.

* * *

> In one opinion, parent and subsidiary are said to be separate if they hold themselves out as being separate or if the parent does not control the subsidiary's pricing. In others, the control factor alone is treated as critical. None explain how the wholly-owned subsidiary can fail to be subject to the control of the parent. Only this case holds that there can never be a sale from parent to subsidiary.

Apparently, the basis for Security's argument for granting certiorari is a conflict among the Circuits. However, an examination of the Fifth Circuit's opinion in this cause, and those opinions of other Circuits touching upon the question, shows that there is no such conflict.

The Fifth Circuit commences its opinion with the rejection of *Danko v. Shell Oil Co.*, 115 F. Supp. 886 (E.D.N.Y. 1953). As the Fifth Circuit pointed out, the District Court in that case, in *obiter dictum*, unwittingly created antitrust theory, to wit: that under some possible circumstances a transfer from a parent corporation to a wholly-owned subsidiary corporation may constitute a sale for Robinson-Patman purposes. Subsequent cases (found in the Fifth Circuit's first footnote in its opinion) have given some lip service to this theory, or, as the Fifth Circuit stated, they repeat "encysted *obiter dictum.*" 598 F.2d 962, 966.

However, the Fifth Circuit correctly states that there is no reported decision in which a Robinson-Patman Act damage award was actually sustained on the basis of the *Danko* theory. Cases which have subsequently cited the *Danko* theory usually cite the case for the general proposition that, under some possible set of circumstances, a transfer between a parent corporation and a wholly-owned subsidiary may constitute a sale within the meaning of the Robinson-Patman Act. *Brewer v. Uniroyal*, 498 F.2d 973, 977 n.2 (6th Cir. 1974) (dicta); *Parrish v. Cox*, 586 F.2d 9, 11-12 (6th Cir. 1978); *Mowery v. Standard Oil Co. of Ohio*,

463 F.Supp. 762 (N.D. Ohio 1976) (dicta) aff'd. 590 F.2d 335 (no opinion); *Schaben v. Samuel Moore and Co.*, 462 F.Supp. 1321 (S.D. Iowa 1978); *Snyder v. Howard Johnson's Motor Lodges, Inc.*, 412 F.Supp. 724 (S.D. Ill. 1976); and *Reines Distributors, Inc. v. Admiral Corporation*, 241 F.Supp. 814, 256 F.Supp. 581, 257 F.Supp. 619 (S.D.N.Y. 1965). None of the courts in the foregoing cases awarded Robinson-Patman damages on the *Danko* theory. Thus, it would seem that the authorities giving lip service to *Danko*, in fact, reject it by refusal to sustain a damage award on such theory.

As to a conflict between the Circuits, the Court in *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974), expressly did not reach the question of whether or not there can be a Robinson-Patman sale from a parent to a subsidiary. The Court in *Parrish v. Cox*, 586 F.2d 9 (6th Cir. 1978) made a statement, in passing, that the Plaintiff contended that a sale between a parent corporation and a wholly-owned subsidiary "may" constitute a sale within the meaning of the Robinson-Patman Act. The Court did rule that the Defendant exercised such control over the company-owned stations that there could not be any sales between the parent and such stations. Its holding went no farther, and it reiterated the antitrust rule that substance controls over form.

The only other Circuit Court of Appeals to pass on the question of whether or not a transfer from a parent to a subsidiary may be a sale under the Robinson-Patman Act is the Ninth Circuit in *Brown v. Hansen Publications, Inc.*, 556 F.2d 969 (9th Cir.1977). An examination of that case shows that it is in accord with the Fifth Circuit's opinion in this case. It stated as follows:

> Appellants argued that control by one corporation of another corporation's pricing policies is the principal factor

> determining whether the corporations are to be treated as separate entities for the purposes of the Robinson-Patman Act. This may be true when the question is whether related corporations selling in the same market are to be treated as a single trader for the purpose of comparing their respective selling prices under Robinson-Patman Act strictures.
>
> * * *
>
> The record reveals that Hansen Publications and Music Retailers are part of a single integrated enterprise, and that transfers between them were indistinguishable from dealings within the same corporate entity. *Id.*, at 971-972.

The holding of the Fifth Circuit in the present case is the same as that of the Ninth Circuit:

> The Robinson-Patman Act separates out and makes illegal competitively harmful discrimination. Intra-corporate transfers and transfers between parent and wholly-owned subsidiary are not the type of transactions the Robinson-Patman Act meant to regulate. The realistic effect on competition should control rather than esoteric and theoretical possibilities under the *Danko* theory couched in terms of 'control' and 'arm's-length dealing.' Realistically, the competition here was between Gates and National as a single economic unit, on the one hand, and Plaintiffs, on the other hand. Internal transfers between Gates and National were of no real competitive consequence. 598 F.2d 962, 967.

In summation, there is not a conflict amongst the Circuit Courts of Appeals so as to require this Court to grant the Petition for Certiorari. First, the Sixth Circuit has not held that there may be, under some circumstances, a transfer from a

parent corporation to a subsidiary so as to constitute a Robinson-Patman Act sale. Second, the Ninth Circuit is in accord with the Fifth Circuit's opinion. Moreover, and irrespective of the foregoing, all the cases that have touched upon the question have refused to award Robinson-Patman Act damages on the theory advanced in *Danko v. Shell Oil Co.*, 115 F.Supp. 886 (E.D.N.Y. 1953). Thus, by refusing to find liability under the *Danko* theory, the cases which have discussed such theory are actually in accord with the Fifth Circuit — that is, under economic substance and reality (and not form), there is no dealing between a parent and wholly-owned subsidiary, so as to constitute a sale for Robinson-Patman purposes. They are one economic unit, and the courts that have discussed the *Danko* theory recognized the fact that they are but one economic unit by refusing to award damages.

Moreover, even if there were a conflict between the Circuits on the question of whether or not there may be a sale from a parent corporation to a wholly-owned subsidiary corporation for the purposes of the Robinson-Patman Act, this is not a case in which the Court should grant the Petition for Certiorari. As the Fifth Circuit noted at 598 F.2d 962, 967, n.3, a review of the record under the *Danko* theory would not change the fate of the Plaintiff's appeal, inasmuch as Gates exercised full dominion and control over National, and there was no arm's length dealing between the two of them. Basically, the Court found that there was insufficient evidence to support the jury verdict under the standard of *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (appellate standard for review of jury verdict). Thus, assuming, for purposes of argument, that a conflict exists among the Circuits, Security would lose its case under either theory.

An examination of the case of *United States v. Sommerville*, 324 F.2d 712 (3rd Cir. 1963) cert. den. 376 U.S. 909 is instructive. The majority opinion and the concurring opinion in

that case reveal that there was a conflict among the Circuits as to whether Federal or State law controlled the determination of the type of liability in question. However, resolution of the conflict by this Court could not have changed the result in the court below, inasmuch as the petitioner in that case would be liable under either Federal law or State law. That is, under either theory, the petitioner's liability was the same. The same is true with Security's fate in this matter. Under either theory, it loses its Robinson-Patman Act claim. Therefore, review of the Fifth Circuit's opinion by this Court would be of little importance to anyone other than the litigants themselves, and the outcome would be the same under the *Danko* theory or the Fifth Circuit's theory.

In this connection, this Court has heretofore stated as follows:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. *SS. Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

It is submitted that Security's Petition is not presented in the context of meaningful litigation, inasmuch as a reversal of the Fifth Circuit's opinion and an affirmation of the *Danko* theory by this Court could not change Security's fate.

Additionally, an examination of Security's Petition for Certiorari shows that it is asking this Court to reject the theory of the Fifth Circuit, to adopt the *Danko* theory and, finally, to examine the record under the *Danko* theory to ascertain whether or not the proof was legally sufficient to sustain the jury's verdict on its Robinson-Patman Act claim. Security's Statement in its Petition for Certiorari is nothing more or less than a rehash of the evidence that Security believes to support the jury verdict. Thus, Security's goal and objective in this cause is review of a

factual matter, which would be of no importance, save to the litigants themselves; and under such circumstances, the Petition for Certiorari should be denied. *Rudolph v. United States*, 370 U.S. 269, 270 (1962).

In summation, there is not a conflict between the Circuits on the question of whether or not there may be a Robinson-Patman sale from a parent to a wholly-owned subsidiary. Even the Courts which have given some lip service to the *Danko* theory have refused to impose Robinson-Patman damages upon a defendant under such theory. Such refusal is tantamount to a rejection of the *Danko* theory. 598 F.2d 962, 966. Thus, the cases which talk in terms of *Danko*, but refuse to find liability in terms of *Danko*, recognize the economic fact that transfers from a parent corporation to its wholly-owned subsidiary are transfers within the same economic unit, and are the equivalent of intra-company transfers of goods.

Moreover, not only is *Danko* inconsistent with economic reality, but it is also inconsistent with other Robinson-Patman antitrust theory which recognizes a parent and subsidiary as a single economic unit so as to attribute the pricing practices of the subsidiary to the parent. *See* 598 F.2d 962, 966.

Second, even if there were conflict among the Circuits, the outcome of this appeal could not change Security's position or fate, thus, making this appeal important to the litigants only and not to the public.

Next, Security infers that the opinion of the Fifth Circuit will have an enormous effect upon the day-to-day commercial life of this country. This is simply not so. Security concedes in its Petition (page eight), that the Fifth Circuit opinion cites almost all the cases involving the question of a sale from a parent to a subsidiary. An examination of the Fifth Circuit's opinion would

reveal that this particular question has been reported, at the most, ten times since the inception of the Robinson-Patman Act, 598 F.2d 962, 966 n.1, and there is no reported opinion which imposes liability under the *Danko* theory, which was based on *obiter dictum* from the outset.

Finally, Security alleged National, and National only, as the favored customer of Gates. There was no further allegation or proof of any other beneficiary of Gates' alleged discrimination. Security's suit itself ignored economic reality because it charged, as Gates' sole discrimination, Gates' refusal to sell to Security at Gates' cost and at no profit. Presumptively, Security would have sued Gates for price discrimination for any discriminatory sales to other private brand sellers of tires, if in fact there had been any price discrimination. Rather, Security, for whatever reason, decided not to pursue such an approach. Instead, it decided to attack a paper transfer of goods between a parent and a wholly-owned marketing subsidiary, which such subsidiary had no existence other than its corporate charter. Thus, the Petition for Certiorari presents no question of public importance because Security does not bring with it any proof of two sales, thereby precluding the possibility of anticompetitive price discrimination proscribed by the Robinson-Patman Act.

CONCLUSION

Petitioner has shown nothing, and there is nothing, which would merit review of the judgment of the Fifth Circuit Court of Appeals by this Court.

Respectfully submitted,

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PROOF OF SERVICE

I, Thomas L. Case, one of the counsel for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of October, 1979, I served a copy of the foregoing Respondent's Brief in Opposition by mailing three copies in a duly addressed envelope, with first class postage prepaid, to Mr. David B. Kultgen, P.O. Box 529, Waco, Texas 76703.

THOMAS L. CASE